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No. 08-

In the Supreme Court of the United States

JEFFREY BEARD,
Petitioner

v.

FRANCIS HANNON,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state official be sued in another State, consistent with principles of due process and state sovereignty, for a single decision made in the official's home State and pursuant to the official's duties?

PARTIES TO THE PROCEEDING

Petitioner is Jeffrey Beard, Secretary of the Pennsylvania Department of Corrections. Respondent is Francis Hannon, a Pennsylvania prisoner who was transferred out of state pursuant to the Interstate Corrections Compact.[1]

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[1] Maryjane Hesse, who is represented by counsel for the Petitioner, was a party in the proceedings in the Court of Appeals but has no interest in the outcome of this petition.

The following parties were listed on the docket in the Court of Appeals but did not participate in the proceedings in that court: Raymond Cook, Sean Milliken, Wayne D. Crosby, Lawrence M. McArthur, Kevin King, Henry LaPlante, William White, Christopher DeMarco, Angel Pimintal, Joseph Lodico, Steven Balsavich, Edward Keith, Michael T. Maloney, Peter Allen, Kristie LaDouceur, Kenneth Deorsey, Paul Duford, Jeffrey Grimes, Richard Medeiros, Gilbert Lemon, II, John Does 1-50, Clark Color Lab, Vincent Mooney, Massachusetts Department of Corrections, Frederick Callendar, Richard McArthur, James Sullivan, Gary Fyfe, Robert Kolber, and Herbert Berger-Hershkowitz. Petitioner believes that they have no interest in the outcome of this petition and is serving and filing the notice required by Sup. Ct. R. 12.6.

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The opinion of the Court of Appeals is reported at 524 F.3d 275 (1st Cir. 2008) and is reprinted in the appendix to this petition ("Pet. App.") at 1a. The decision of the district court is not reported but is available electronically at 2007 WL 1858672 (D. Mass. June 26, 2007) and is reprinted at Pet. App. 22a.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on April 28, 2008. Petitioner filed a timely petition for rehearing, which was denied on June 6, 2008. Pet. App. 39a-40a. This petition is being filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part, "nor shall any person ... be deprived of life, liberty, or property, without due process of law[.]" U.S. CONST. AMEND. V. Similarly, the Fourteenth Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. AMEND. XIV, § 1.

STATEMENT OF THE CASE

In this case, Petitioner asks the Court to decide whether it is constitutionally permissible for a court to exercise personal jurisdiction over a state official who has been sued in a foreign State – here, for a single decision, made in the official's home State, pursuant to his official duties – without giving special consideration to the sovereignty interests of the official's State and the governmental character of the official's acts. Specifically, this case arises out of the transfer of a state prisoner from Pennsylvania to Massachusetts pursuant to the Interstate Corrections Compact (ICC).[2] The Court of Appeals held that a Massachusetts court could exercise personal jurisdiction over a Pennsylvania official in order to decide whether that official transferred the prisoner for an improper reason. In so holding, the Court of Appeals discounted the inherent differences between governmental and non-governmental activities, dismissed the importance of holding state officials accountable in their own States for alleged abuses of their state-conferred authority, and failed to take into

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[2] Pennsylvania's version of the ICC is at Pa. Stat. Ann., tit. 61, §§ 1061-1063; Massachusetts' version is at Mass. Gen. Laws ch. 125 App., § 2-1. Thirty-eight other States and the District of Columbia are parties to the ICC. *See* NATIONAL CENTER FOR INTERSTATE COMPACTS, *Interstate Compact Database* (available at http://www.csg.org/programs/ncic/database/search.aspx) (visited Aug. 28, 2008). There are also similar regional compacts: the New England Corrections Compact (to which all six New England States belong) and the Western Corrections Compact (which eleven Western States have joined). *Id.*

account the practical effects of its decision on prison administration and elsewhere.

While the underlying dispute here is between one inmate and one prison official, the decision of the Court of Appeals has broad implications for state officials throughout the country. Not only does the decision allow prison officials who invoke the ICC to be sued by transferred inmates practically anywhere; logically, it also clears the way for state government defendants to be sued outside the States they serve on other types of claims. For example, under the reasoning of the Court of Appeals, officials charged with enforcing state statutes may be sued by out-of-state targets in the targets' home states. This result cannot be reconciled with the Court's personal jurisdiction precedents or with decisions of other courts of appeals in cases against state defendants.

1. Petitioner is the Secretary of Pennsylvania's Department of Corrections (DOC). Pet. App. 32a. From this cabinet-level position,[3] he supervises over 14,000 employees and oversees the operation of more than two dozen state correctional institutions and other facilities housing over 45,000 prisoners.[4] Respondent, one of those prisoners, was convicted of first degree murder in 1978; was sentenced to life imprisonment; and has served time in a number of Pennsylvania and out-of-state institutions. *See* Pet.

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[3] *See* Pa. Stat. Ann., tit. 71, §§ 66, 67.1(d)(1), 310-1.

[4] *See* PA. OFFICE OF ADMINISTRATION, *2008 Governor's Annual Work Force Report* 5 (Table 4) (available at http://www.workforcereport.state.pa.us) (visited Aug. 20, 2008); PA. DEPT. OF CORRECTIONS, *Monthly Population Report* 1 (July 2008), *available at* http://www.cor.state.pa.us/portal/lib/portal/monthly_population.pdf (visited Aug. 20, 2008).

App. 3a-4a. In December of 2001, he was transferred to Massachusetts and remained there until January of 2007, when he was transferred to New Jersey.[5] Pet. App. 5a.

Respondent has been an active jailhouse lawyer, advocating for himself and other inmates. Pet. App. 3a. Citing this activity, he has challenged his intrastate and interstate transfers as retaliatory, but to date has not prevailed on these claims. *See, e.g.*, *Hannon v. Terra*, No. 94-2845, 1995 WL 129219, at *11-12 (E.D. Pa. Dec. 19, 1986).

2. Respondent filed this action, pursuant to 42 U.S.C. § 1983, in October of 2003, against Secretary Beard and Pennsylvania institutional librarian Maryjane Hesse.[6] Over a year later, the District Court appointed counsel to represent Respondent, and counsel filed an amended complaint. Respondent alleged that Petitioner transferred him to Massachusetts in retaliation for his jailhouse lawyering and that after that transfer Ms. Hesse unjustifiably denied his requests for Pennsylvania and District of Columbia legal materials. He sought damages and an injunction against "further violations" of his constitutional rights.

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[5] Under Article IV(c) of the ICC, Respondent's status as a Pennsylvania prisoner did not change, even when his location did. *See* Pa. Stat. Ann., tit. 61, § 1062; Mass. Gen. Laws ch. 125 App., § 2-1.

[6] The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343. Respondent was joined in his action by a group of Massachusetts inmates, and together they asserted claims against a group of Massachusetts prison officials and certain private parties. None of those other plaintiffs, defendants or claims is involved in this petition.

The two Pennsylvania defendants moved to dismiss on several grounds, including lack of personal jurisdiction, and their motion was granted. Pet. App. 32a-36a.[7] The District Court concluded that Petitioner's "mere transfer" of Respondent pursuant to the ICC did not "constitute[] the transaction of business in Massachusetts" for purposes of the Massachusetts long-arm statute, Mass. Gen. Laws ch. 223A, § 3(a), Pet. App. 35a, and on that basis dismissed Respondent's claims against both Pennsylvania defendants for lack of personal jurisdiction. Pet. App. 35a-36a. The court certified this decision as a final judgment pursuant to Fed.R.Civ.P. 54(b) and Respondent appealed.

3. The Court of Appeals affirmed the jurisdictional dismissal of Respondent's claims against Ms. Hesse, the Pennsylvania librarian, but it reversed the dismissal of his claims against Petitioner. Pet. App. 21a.

The Court of Appeals began by acknowledging that Massachusetts had no basis for asserting general jurisdiction over Beard or Hesse – there was no allegation that they had engaged in the kind of "continuous and systematic activity" that would support such jurisdiction – and thus turned immediately to the question of "specific" jurisdiction, that is, whether there is "a demonstrable nexus between a plaintiff's claims and a defendant's forum-based activities." Pet. App. 7a. The Court of Appeals

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[7] While the motion to dismiss was pending, Respondent learned that he was to be transferred again. He attempted to have his transfer enjoined but was unsuccessful. *See Hannon v. Maloney*, 242 Fed. Appx. 712 (1st Cir. 2007) (affirming denial of injunction).

took it as given that Petitioner had "arranged" Respondent's transfer, Pet. App. 9a, 10a, and this, the court assumed, "necessarily involved at least some communication and interaction between Beard in Pennsylvania and his counterparts in Massachusetts." Pet. App. 10a.[8] The Court of Appeals held that "[t]he contacts that Beard would have had to make to arrange for Hannon's transfer from Pennsylvania to Massachusetts are sufficient to constitute 'transacting business' under the broadly construed [Massachusetts] long arm statute." *Ibid.*[9] The fact that Petitioner's actions were governmental rather than "commercial," was simply "not relevant" to consideration of the "transacting business" requirement. *Ibid.* Beyond that, the court said, there was no basis for treating Petitioner's status as a state official as a bar to his being subject to personal jurisdiction in a foreign State. Pet. App. 11a.

Turning to the "due process" prong of the personal jurisdiction analysis, the Court of Appeals said that "it seem[ed] clear that Hannon's claims against Beard arise from Beard's voluntary contacts with Massachusetts." Pet. App. 13a. The court deemed those contacts "related" to Respondent's retaliation

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[8] Even assuming that Respondent was transferred to Massachusetts with Petitioner's knowledge, the assumption that Petitioner actually arranged the transfer (and thus had contact with Massachusetts himself) is unfounded. Documents that Respondent placed in the record show that it was a DOC employee who forwarded an ICC "referral" to her counterpart in Massachusetts, who then processed it.

[9] In contrast, the court found that Ms. Hesse, the librarian, did not "transact business" in Massachusetts, even though she personally received and responded to a number of letters from Respondent when he was incarcerated in Massachusetts. Pet. App. 11a-12a.

claim because the claim was "based on the transfer itself" and Respondent's "alleged constitutional injury would not have occurred 'but for' Beard's arrangement for his transfer." *Ibid.*

The Court of Appeals acknowledged concerns that its holding would subject prison officials across the country to lawsuits in every State that is a party to the ICC, but thought that its decision "ought not have this affect [sic]." Pet. App. 15a. The Court of Appeals distinguished decisions from other courts that had declined to exercise jurisdiction over out-of-state prison officials, on the ground that all those cases involved "pre-transfer grievances," as opposed to challenges to the transfers themselves, and therefore "would not survive the relatedness inquiry". Pet. App. 15a-16a.[10]

Next, the Court of Appeals considered whether Petitioner's contacts with Massachusetts represented "a purposeful availment of the privilege of conducting activities in the forum state." Pet. App. 16a. Conceding that this was "a close question," the court concluded that "[a]rguably, Beard benefitted from subjecting Hannon to Massachusetts prisons and Massachusetts law by ridding himself of a troublemaker." Pet. App. 17a. Having already conceded that no court in a receiving State had previously entertained such a challenge, the Court of Appeals nevertheless thought that litigation over Respondent's ICC transfer was foreseeable. Pet. App. 17a-18a.

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[10] One of the cases Petitioner had cited in fact did include a challenge to the prisoner's transfer. *See Bedell v. Angelone*, No. 2:01CV780, 2003 WL 24054709, at * 16 (E.D. Va. Oct. 3, 2003), *aff'd*, 87 Fed. Appx. 323 (4th Cir. 2004) (per curiam).

Finally, the Court of Appeals confronted the issue of whether asserting personal jurisdiction over Petitioner would be constitutionally "reasonable." Pet. App. 18a. This, in turn, required the court to consider five factors, and the court found that all weighed heavily or at least slightly in Respondent's favor. Pet. App. 18a-20a.

First, relying on a complicated high-stakes private breach-of-contract case where it had held "that travel between New York and Puerto Rico was not an unusual burden for a defendant," the Court of Appeals saw "no reason why appearing in Massachusetts would be a special burden beyond ordinary inconvenience" for Petitioner. Pet. App. 19a. The court did not discuss the cumulative burden that would be placed on Pennsylvania and other States if this method of challenging transfers became popular. Nor did it note that dealing with this burden would entail spending public rather than private funds, diverting them from other uses. Nor did it discuss the impact of lessening the usefulness of the ICC, if because of this burden prison administrators became less inclined to utilize it.

As for the second "reasonableness" factor, the forum's interest, the court said that Massachusetts "may" have "some" interest in adjudicating this dispute, because it "may" not want prisoners who have been subjected to retaliation sent to its prisons. Pet. App. 19a. The court did not address any countervailing interest Massachusetts may have in not having to defend *its* officials in other States in other cases, should they be sued on similar claims, nor did it discuss Massachusetts' interest in not encouraging prisoners to bring burdensome litigation.

Third, considering Respondent's interest, the Court of Appeals stressed that Respondent had been

granted court-appointed counsel in Massachusetts. Pet. App. 19a-20a. This meant he retained "some" interest in litigating his claims against Petitioner in Massachusetts (where the rest of this action would be litigated) – even though he was no longer in Massachusetts himself. *Ibid.* Fourth, reiterating its awareness that Respondent has Massachusetts counsel, and adding that changing venue "may entail substantial judicial resources," the court found that "it may be most effective [for the judicial system] to keep the action in Massachusetts." Pet. App. 20a. That the relevant evidence and witnesses are probably in Pennsylvania was not mentioned. Finally, the Court of Appeals said, "the interests of all sovereigns in promoting substantive social policies may weigh slightly in Hannon's favor[,]" even though "this factor does not weigh particularly in Hannon's favor because the same interest [in scrutinizing possibly retaliatory ICC transfers] would be served in a Pennsylvania district court." *Ibid.*

4. Petitioner filed a timely request for panel rehearing or rehearing en banc, but his petition was denied. Pet. App. 39a-40a.

REASONS FOR GRANTING THE WRIT

Whether a district court in one State can exercise personal jurisdiction over a state official from another State, consistent with principles of state sovereignty and due process, is an important and unresolved issue. *See Leroy v. Great W. United Corp.*, 443 U.S. 173, 180-181 (1979) (noting but not resolving the issue). This case presents another iteration of the problem. The decision of the Court of Appeals

warrants review on certiorari because it conflicts with other relevant decisions of this Court and with the decisions of other courts of appeals in cases involving litigation against out-of-state officials.

I. This Case Presents An Important And Recurring Issue Which The Court Has Not, But Should, Resolve.

Even within the limited area of prison administration, the Court of Appeals' decision has the potential to create much mischief. At any given time, many thousands of prisoners, from virtually every State, are serving their sentences in out-of-state prisons; and most of these transfers occur for reasons, such as alleviating overcrowding or relieving a security threat, that have nothing to do with the wishes of the prisoners involved.[11] Lawsuits by disgruntled prisoners that attempt to challenge such transfers on their merits are apt quickly to be dismissed, *see Olim v. Wakinekona*, 461 U.S. 238 (1983) (interstate prison transfer does not implicate liberty interest), but actions claiming that a transfer was retaliatory for some protected activity are a very different matter.

As the Court has recognized, claims of this kind, which turn on the defendant's motive, are often difficult to resolve short of a trial. "Because an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on improper

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[11] *See* U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF CORRECTIONS, *Interstate Transfer of Prison Inmates in the United States* at 2 (February 2006), available at http://nicic.org/download/pdf/library/021242.pdf (visited Aug. 28, 2008).

intent may be less amenable to summary disposition than other types of claims against government officials." *Crawford-El v. Britton*, 523 U.S. 574, 584-585 (1998) (internal quotation marks omitted). Defending against such claims thus imposes substantial burdens on state defendants under the best of circumstances. The Court of Appeals' decision greatly adds to those burdens, by requiring prison officials to transport themselves, witnesses and other evidence potentially vast distances in order to defend against these claims. *See, e.g., Trujillo v. Williams*, 465 F.3d 1210 (10th Cir. 2006) (involving Virginia-to-New Mexico transfer).

Prisoners in recent years have increasingly resorted to retaliation theories as a means of attacking prison decisions that they cannot attack directly,[12] and the Court of Appeals' decision in this case will encourage more such lawsuits challenging interstate transfers. The predictable result will be that prison officials will become less willing to utilize the ICC and similar tools to manage security and overcrowding problems, with ripple effects throughout the system as those officials must find other ways to deal with these concerns.

Nor is there any reason to suppose that the impact of the Court of Appeals' decision will in fact be confined to the prison context. Under that decision's logic, any state official who enforces a state statute against an out-of-state target could be sued in the target's home state, as two petitions now before the Court illustrate. *See Stroman Realty, Inc. v.*

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[12] A WestLaw search reveals that in the first six months of 2008, the courts of appeals alone issued nearly a hundred decisions in prisoner cases involving claims of retaliation.

Wercinski, 513 F.3d 476 (5th Cir. 2008), *petition for cert. filed*, No. 07-1387 (May 5, 2008); *Stroman Realty, Inc. v. Antt*, 528 F.3d 382 (5th Cir. 2008), *petition for cert. filed*, No. 08-109 (Aug. 12, 2008).

The Court should therefore resolve this issue because it is not only important and recurrent but also because, as discussed in Points II and III, the Court of Appeals' decision is inconsistent with the decisions of this Court and those of other courts of appeals.

II. The Decision Of The Court Of Appeals Is Contrary To Decisions Of This Court.

In the personal jurisdiction due process calculus, the "primary concern" is the burden on the defendant. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). This concern for the defendant is heightened when that defendant is a state official, sued in another State.

In this case, the Court of Appeals recited standard personal jurisdiction principles, but in applying those principles failed to take into account Petitioner's status as a state official. This was a departure from the Court's major personal jurisdiction decisions, none of which was mentioned by the Court of Appeals. Those decisions lead unavoidably to the conclusion that in analyzing personal jurisdiction, a court may neither overlook States' general sovereignty concerns nor disregard the governmental nature of a particular state defendant's actions.

A. Concern for States' sovereign interests is a recurring theme in the Court's personal jurisdiction jurisprudence.

Personal jurisdiction jurisprudence rests on a foundation of state sovereignty. Well over a century ago, the Court held in *Pennoyer v. Neff*, 95 U.S. 714 (1878), that, absent consent, a court cannot assert jurisdiction over someone beyond its borders, because the extra-territorial assertion of jurisdiction over a person or property "would be deemed an encroachment upon the independence of the State in which the persons are domiciled or the property is situated...." *Id.* at 723.

While later cases moved away from a strictly territorial analysis of personal jurisdiction, the Court has continued to recognize that personal jurisdiction issues must still be assessed "in the context of our federal system of government." *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945). The Court, even while acknowledging a "trend of expanding personal jurisdiction over non-residents," *Hanson v. Denckla*, 357 U.S. 235, 250-251 (1958), has continued to emphasize that the limits on personal jurisdiction are rooted in considerations of state sovereignty. "They are a consequence of territorial limitations on the power of the respective States." *Id.* at 251.

These sovereignty principles were expressed even more emphatically in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The Court explained that the due process concept of "minimum contacts" not only "protects the defendant against the burdens of litigating in a distant or inconvenient forum" but also "ensure[s] that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal

system." *Id.* at 292. The Due Process Clause serves as "an instrument of interstate federalism" and may sometimes act to divest a court of the power to render a valid judgment. *Id.* at 294. Considerations of sovereignty and federalism are thus integral to the analysis of constitutional reasonableness under *World-Wide Volkswagen*.

The Court of Appeals, however, failed to take these considerations into account. The Court of Appeals perceived no special burden on Petitioner as a defendant, much as it might perceive no special burden on a businessman who had to travel from Harrisburg to Boston when sued. Pet. App. 19a. But the burdens on a state official sued in a foreign State are not the same as those faced by a private individual or entity. *See* Tracy O. Appleton, *The Line Between Liberty and Union: Exercising Personal Jurisdiction Over Officials From Other States*, 107 COLUM. L. REV. 1944, 1986-1990 (2007) (discussing interests, including sovereign interests, potentially at stake in suits against foreign state officials). The Court of Appeals paid no heed to the cumulative burdens of this kind of litigation, or to the fact that those burdens fall not so much on Petitioner personally as upon the prison system as a whole, diverting resources from other uses; and it took no account of the impact of undermining the usefulness of the ICC and similar interstate agreements.

The Court of Appeals also failed to recognize that the relative interests of the forum State and the defendant's State are different in a case like this than in a case involving purely private interests. The Court of Appeals theorized that Massachusetts "may" have an interest in adjudicating this case. Pet. App. 19a. But it did not recognize that (a) Pennsylvania, to whom the Petitioner is accountable for his conduct,

has a special interest in seeing that a claim about the propriety of that conduct is resolved in Pennsylvania; (b) Massachusetts likewise has an interest that claims against *its* officials be resolved in their home State; and (c) virtually all of the evidence and witnesses relevant to Respondent's improper transfer claim are likely to be in Pennsylvania

* * * * *

To do their jobs, state officials must be allowed to exercise reasonable discretion without fear of being sued, *cf. Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982), especially not in a distant State. Requiring a state official to defend against a claim in a foreign jurisdiction is a double imposition on the official's exercise of discretion. A prisoner is, of course, entitled to bring suit against a state official for violation of constitutional rights, but the prisoner should not be entitled to do so in a jurisdiction where the official does not have, and never had, any physical presence.

B. Giving due consideration to the "quality and nature" of a defendant's activity, particularly non-commercial activity, is essential under *Kulko*.

In addition to incorporating principles of federalism and state sovereignty, due process requires a court to consider the "quality and nature" of the defendant's activity in deciding whether to exercise personal jurisdiction. *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978). In *Kulko*, the Court held that the California courts could not assert personal jurisdiction over a divorced father in New York, merely because the father had sent his child to join her mother in

California. A critical factor in the Court's reasoning was that the "cause of action here asserted arises, not from the defendant's commercial transactions in interstate commerce, but rather from his personal, domestic relations." *Id.* at 97. *See also id.* at 101 (sending child to join mother California "is not a commercial act"). That, in turn, shed important light on the "quality and nature" of the father's activities. All told, "basic considerations of fairness" pointed decisively to New York as the proper forum for adjudicating the parties' dispute. *Id.* at 97.

Like the actions of Mr. Kulko, the "quality and nature" of the actions of a state official are not "commercial," nor are they undertaken for private gain of any sort, and the Court of Appeals erred in ignoring this reality. If the act of sending a child across state lines is not enough to support personal jurisdiction in the receiving State, it is difficult to see – and the Court of Appeals did not explain – why the act of sending a prisoner across state lines should be any different.

III. The Court Of Appeals' Decision Cannot Be Reconciled With The Decisions Of The Other Circuits That Have Addressed This Issue.

Hinging, as they do, on "reasonableness," personal jurisdiction determinations are unavoidably fact-specific. *See Burger King Corp. v. Rudzewicz*,, 471 U.S. 462, 485-486 & n. 29 (1985); *Kulko*, 436 U.S. at 92. Consequently, canvassing appellate decisions involving jurisdiction over claims against out-of-state officials does not reveal a circuit split in the conventional sense. What it does reveal, though, is a pronounced trend *against* finding that state officials are amenable to suit in foreign States. With varying

degrees of emphasis on sovereignty considerations and defendants' governmental roles, most courts of appeals have declined to ratify the assertion of personal jurisdiction over state officials who have been sued outside their home States. There are two counter-examples, but in both the courts *did* take sovereignty into account; personal jurisdiction was held proper in those two situations due to the extraordinary facts presented, not because the officials were indistinguishable from private parties.

Very recently, the Seventh Circuit affirmed the dismissal of an inmate's ICC transfer-related claims for lack of personal jurisdiction. *Kinslow v. Pullara*, --- F.3d---, No. 07-2956, 2008 WL 3519882 (7th Cir. Aug. 14, 2008). *Kinslow* contrasts with the decision of the Court of Appeals in this case in at least two ways. First, the Seventh Circuit did not view the compact between the *States* of New Mexico and Illinois as an adequate predicate for finding that the named New Mexico *defendants* had the requisite contacts with Illinois for jurisdictional purposes. *Id.*, at *4-5. *Cf.* Pet. App. 9a-10a. Second, the Seventh Circuit refused to assume that any of the defendants had "sufficient personal contacts" to support personal jurisdiction – even in the case of the defendant (McReynolds) who had actually made the transfer arrangements with officials in the receiving State. *Id.* at *1, 6. *Cf.* Pet. App. 10a (upholding personal jurisdiction over Petitioner because there must have been "at least some communication between [Petitioner] and his counterparts in Massachusetts").

Similarly, in *Trujillo v. Williams*, 465 F.3d 1210 (10th Cir. 2006), the Tenth Circuit refused to allow a New Mexico prisoner who had been transferred to Virginia to sue Virginia prison officials in New Mexico. As in *Kinslow*, the court differentiated

between implementing an ICC transfer order and actually having sufficient contacts with a foreign state to justify the assertion of jurisdiction. *See Trujillo*, at 1218-1221. Moreover, the prospect of the prisoner having to proceed in two different forums did not trouble the Tenth Circuit: "[T]he New Mexico defendants will be held accountable for their conduct in New Mexico, and the Virginia defendants will be held accountable for their conduct in Virginia." *Id.* at 1222. *Cf.* Pet. App. 18a, 20a.

Outcomes in the Fifth Circuit are the same. In *Stroman Realty, Inc. v. Wercinski*, 513 F.3d 476 (5th Cir. 2008), *petition for cert. filed*, No. 07-1387 (May 5, 2008), the court held that a Texas company could not bring a civil rights claim in a Texas district court, against an Arizona official who had taken steps to enforce Arizona law against the company.[13]

Unlike the First Circuit, the Fifth Circuit in *Stroman* was fully cognizant of the defendant's governmental status and the sovereignty and federalism concerns that arise when state officials are sued in foreign jurisdictions. Though conceding that the defendant official had "reached out" to assert her authority over the Texas company, the court held that she had not "'purposefully availed' herself of the benefits of Texas law like someone actually 'doing business' in Texas." *Stroman*, 513 F.3d at 484.[14] The

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[13] The Fifth Circuit rendered a similar ruling in *Stroman Realty, Inc. v. Antt*, 528 F.3d 382, 386-387 (5th Cir. 2008), *petition for cert. filed*, No. 08-189 (Aug. 12, 2008), which involved claims by the same Texas company against state officials from Florida and California.

[14] The court had already expressed doubt that the activities of a state official would amount to "doing business" under the applicable long-arm statute. *Stroman*, 513 F.3d at 484.

Fifth Circuit also understood that the defendant was not engaged in commercial transactions and did not seek (or obtain) any commercial benefit; she was, instead, "acting in a governmental capacity." *Id.* at 485 (citing *Kulko*). *Cf.* Pet . App. 10a-11a. And the court was sensitive to the untoward implications of upholding jurisdiction: doing so could subject the defendant "and, for that matter, any state official" to suit in multiple foreign states. *Id.* at 486. *Cf.* Pet. App. 15a.

The Fourth Circuit held likewise in *City of Virginia Beach, Virginia v. Roanoke River Basin Ass'n*, 776 F.2d 484 (4th Cir. 1985), a water resources case. There, even though the Governor of North Carolina had had discussions and attended meetings in Virginia, the court concluded that applicable long-arm requirements (which extend to the limits of due process) were not met. *Id.* at 487-488. The concurring judge observed, "While the governor's contacts may ... amount to 'business' in the expansive colloquial sense of the word, the Virginia [long-arm] statute is primarily concerned with private business, and not with the conduct of state affairs by the principal executive officer of a sovereign." *Id.* at 489.

In the Sixth Circuit, the D.C. Circuit, and the Federal Circuit as well, personal jurisdiction over state officials from foreign States has been found wanting. *See Mich. Coalition of Radioactive Material Users v. Griepentrog*, 954 F.2d 1174 (6th Cir. 1992) (Michigan organization could not bring suit in Michigan against officials of three other States to force them to grant access to radioactive waste disposal sites); *United States v. Ferrara*, 54 F.3d 825 (D.C. Cir. 1995) (official of New Mexico Supreme Court could not be sued in D.C. to enjoin disciplinary action against attorney licensed in New Mexico but

employed in D.C.);[15] *Pennington Seed, Inc. v. Produce Exchange No. 299*, 457 F.3d 1334 (Fed. Cir. 2006) (no personal jurisdiction over Arkansas state university officials sued in Missouri for patent infringement).

The only circuits to have found the exercise of personal jurisdiction over foreign state officials proper are the Ninth and the Second, and both cases involved officials who had allegedly violated the law while physically present in the forum State. In *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001), a plaintiff sued New York officials in California, asserting that he had been wrongfully arrested in California, extradited, and incarcerated in New York. The Ninth Circuit held that personal jurisdiction could not be asserted over those New York defendants "whose interaction with [the arrestee] took place solely in New York," *id.* at 692, upholding jurisdiction only over those New York officers "who were directly involved in the extradition ... and in fact traveled to California to pick [the arrestee] up and take him to New York." *Ibid.* [16]

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[15] *See also Hannon v. Beard*, No. 03-7145, 2005 WL 18052 (D.C. Cir. Jan. 4, 2005), *aff'g* No. 02-1779 (D.D.C. Sept. 26, 2003) (in another action brought by Respondent, allegations against non-resident state prison officials insufficient to confer jurisdiction under D.C. long-arm statute).

[16] The Ninth Circuit explicitly requires consideration of "the extent of conflict with the sovereignty of the defendant's state." *Ziegler v. Indian River County*, 64 F.3d 470, 475 (9th Cir. 1995). District courts in the Ninth circuit have relied upon that factor in finding no personal jurisdiction over non-forum state officials. *See PTI, Inc. v. Philip Morris, Inc.*, 100 F. Supp.2d 1179, 1190 (C.D. Cal. 2000). *See also Dial Up Services, Inc. v. State of Oregon*, No. 07-00423, 2007 WL 4200756, at *5 (D. Ariz. Nov. 27, 2007).

Finally, the Second Circuit upheld personal jurisdiction in *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005), *cert. denied*, 127 S.Ct. 379 (2006). The plaintiffs there alleged that the Master Settlement Agreement (MSA), which resolved nationwide tobacco litigation brought by state attorneys general, violated the Sherman Antitrust Act. The Second Circuit held that the attorneys general could be sued in New York because the alleged antitrust violation – the negotiation and execution of the MSA – had occurred in New York. Even in so holding, the court recognized that it was dealing with an exceptional situation, noting "that New York would not ordinarily be the proper forum to challenge another state's legislative and executive actions." *Id.* at 167.

Even assuming that personal jurisdiction in these last two cases was properly asserted, they are a far cry from the circumstances of this case, where no physical presence in the forum State is even alleged. There can be little doubt that, if this case had been brought in any of the above circuits – including the Second or Ninth – the outcome would have been different. The Court of Appeals' decision in this case cannot be reconciled either with the decisions of the other circuits, or with the principles that underlie the decisions of this Court. The Court should review this decision to resolve the matter.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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